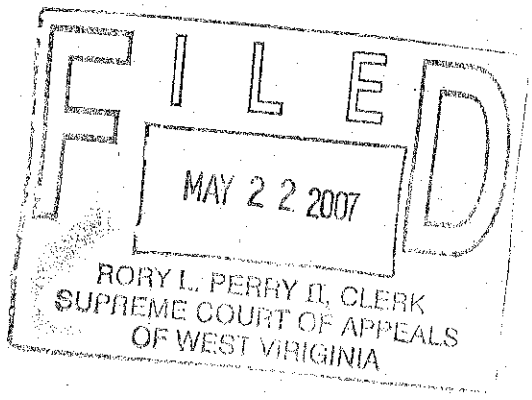
IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
CHARLESTON



LONNIE HANNAH, Sheriff of Mingo County; MINGO OFFICE OF EMERGENCY SERVICES; and THE COUNTY COMMISSION OF MINGO COUNTY,

Lonnie Hannah, Sheriff of Mingo County, Appellant/Defendant-Below,

v.

Appeal No. 33382

MARCUM TRUCKING COMPANY, INC.; and 263 TOWING , INC.,

Appellees/Plaintiffs-Below.

APPELLANT'S BRIEF

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LONNIE HANNAH, Sheriff of Mingo County; MINGO OFFICE OF EMERGENCY SERVICES; and THE COUNTY COMMISSION OF MINGO COUNTY,

Lonnie Hannah, Sheriff of Mingo County,
Appellant/Defendant-Below,

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Appellees/Plaintiffs-Below.

APPELLANT'S BRIEF

I.

PROCEEDINGS IN THE COURT BELOW

A. Introduction.

The instant case involves two closely-linked cases that were disposed of more or less simultaneously by the court below. The two cases had different plaintiffs/petitioners but, for the most part, the same defendants/respondents. The first case involved 263 Towing, Inc. as plaintiff/ petitioner ("263 Towing"). The second case involved as plaintiff/petitioner, Marcum Trucking Company, Inc. ("Marcum Trucking"). Each case involved Lonnie Hannah, the Sheriff of Mingo County ("Sheriff Hannah" or "the Sheriff"), the County Commission of Mingo County ("the County Commission"), and, at various times, the Mingo County Office of Emergency Services ("the Emergency Services Office"), as defendants/respondents. In each case the plaintiffs/petitioners sought payment for work ostensibly done for Mingo County.

Because the two cases bear different case captions, the proceedings in each will be discussed separately. Because the two cases were decided on similar facts and legal theories, however, a single factual statement and unified argument will be presented in support of the instant Appellant's Brief.

B. The 263 Towing case.

263 Towing filed its 263 Towing. Inc.'s Petition for Writ of Mandamus in the Circuit Court of Mingo County, West Virginia on October 18, 2005. In that action 263 Towing sought the issuance of a rule to show cause so as to require Sheriff Hannah to sign checks in payment for invoices totaling $288,180.00 allegedly owed to 263 Towing by the Mingo County County Commission. The trial court responded on October 20, 2005 with an Order Directing Petitioner to Provide Additional

Information. 263 Towing responded in turn on November 30, 2005 with its 263 Towing, Inc.'s Response to Order Directing Petitioner to Provide Additional Information ("263 Towing's Response").

263 Towing thereupon filed its 263 Towing. Inc.'s Amended Petition for Writ of Mandamus ("the 263 Amended Petition"), on January 20, 2006. This amended pleading named the Emergency Services Office and the County Commission as additional party defendants and respondents. Simultaneously, 263 Towing filed a proposed Order and Rule to Show Cause. Answers to the Amended Petition were filed by Sheriff Hannah on June 9, 2006 ("the Sheriff's 263 Towing Answer")[1] and by the County Commission on June 12, 2006.[2] The trial court found that 263 Towing had made out a prima facie case and so issued an Order and Rule to Show Cause on May 26, 2006. A hearing was held in the matter on October 2, 2006.

The court below then issued its Final Order Granting Writ of Mandamus ("the 263 Towing Final Order"), on October 3, 2006. In that order, the trial court ordered Sheriff Hannah to sign the disputed check for $175,200.00, denied any award of prejudgment interest, and ordered Sheriff Hannah to pay 263 Towing the sum of $1,575.00 in attorney's fees.

On October 4, 2006, Sheriff Hannah filed a Motion to Vacate Final Order Granting Writ of Mandamus. On October 10, 2006, Sheriff Hannah asked this Court to stay proceedings pursuant to

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[1] Although this response was filed by counsel, Sheriff Hannah was forced for want of the support of the County Commission to appear *pro se* for most of the proceedings. The Sheriff asks the Court to consider his brief with due regard for his *pro se* status, particularly at the hearings on this matter.

[2] Although the County Commission was nominally a defendant/respondent in this matter, the fact is that they strongly favored and even advocated the relief being sought by 263 Towing, i.e., the execution of the check by Sheriff Hannah.

W.Va.R.App.P. 6(a), as well as seeking the disqualification of the trial judge. On October 11, 2006, this Court, per Chief Justice Davis, issued an Administrative Order maintaining the trial judge in his position presiding over this case. Thereafter, the trial court issued its Final Order Denying Motion to Vacate and Denying Application for Circuit Court Stay of Proceeding ("the 263 Towing Final Order Denying Motion"), on October 16, 2006. It is that disposition, along with the underlying 263 Towing Final Order, to which the Appellant's Brief is directed.

C. The Marcum Trucking case.

Marcum Trucking filed its Marcum Trucking Company. Inc.'s Petition for Writ of Mandamus in the Circuit Court of Mingo County, West Virginia on October 18, 2005. In that action Marcum Trucking sought the issuance of a rule to show cause so as to require Sheriff Hannah to sign checks in payment for invoices totaling $103,275.00 allegedly owed to Marcum Trucking by the Mingo County County Commission. The trial court responded on October 21, 2005 with an Order Directing Petitioner to Provide Additional Information. Marcum Trucking responded in turn on November 30, 2005 with its Marcum Trucking Company, Inc.'s Response to Order Directing Petitioner to Provide Additional Information ("Marcum Trucking's Response").

Marcum Trucking thereupon filed its Marcum Trucking Company Inc.'s Amended Petition for Writ of Mandamus ("the Marcum Trucking Amended Petition"), on January 20, 2006. This amended pleading named the Emergency Services Office and the County Commission as additional parties defendant and respondent.[3] Simultaneously, Marcum Trucking filed a proposed Order and

[3] In point of fact, the County Commission is named as a party defendant/respondent on every Marcum Trucking pleading; the Emergency Services Offices is so named on only some of the Marcum Trucking pleadings.

Rule to Show Cause. The trial court found that Marcum Trucking had made out a prima facie case and so issued an Order and Rule to Show Cause on May 26, 2006. Answers to the Amended Petition were filed by Sheriff Hannah on June 9, 2006 ("the Sheriff's Marcum Answer")[4] and by the County Commission on June 12, 2006.[5] A hearing was held in the matter on August 29, 2006. Marcum Trucking then filed its Marcum Trucking Company, Inc.'s Documentation for Attorneys' Fees and Calculation of Interest Due on September 1, 2006.

The court below then issued its Amended Final Order Granting Writ of Mandamus ("the Marcum Trucking Amended Final Order"), on October 3, 2006. In that order, the trial court ordered Sheriff Hannah to sign the disputed check for $103,275.00, ordered Sheriff Hannah to pay Marcum Trucking prejudgment interest of $9,027.19, and ordered Sheriff Hannah to pay Marcum Trucking the sum of $4,214.00 in attorney's fees.

On October 4, 2006, Sheriff Hannah filed a Motion to Vacate Final Order Granting Writ of Mandamus. On October 10, 2006, Sheriff Hannah asked this Court to stay proceedings pursuant to W.Va.R.App.P. 6(a), as well as seeking the disqualification of the trial judge. On October 11, 2006, this Court, per Chief Justice Davis, issued an Administrative Order maintaining the trial judge in his position presiding over this case. Thereafter, the trial court issued its Final Order Denying Motion to Vacate and Denying Application for Circuit Court Stay of Proceeding ("the Marcum Trucking

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[4] Although this response was filed by counsel, Sheriff Hannah was forced for want of the support of the County Commission to appear *pro se* for most of the proceedings. The Sheriff asks the Court to consider his Appellant's Brief with due regard for his *pro se* status, particularly at the hearings on this matter.

[5] Although the County Commission was nominally a defendant/respondent in this matter, the fact is that they strongly favored and even advocated the relief being sought by Marcum Trucking, i.e., the execution of the check by Sheriff Hannah.

Final Order Denying Motion"), on October 16, 2006. It is that disposition, along with the underlying Marcum Trucking Amended Final Order, to which the present Appellant's Brief is directed.

II.

STATEMENT OF FACTS

A. Background.

A rainfall of monumental proportions began to fall on Mingo County on May 31, 2004. By early the next morning, serious and even devastating flooding had begun. In the end, a large part of the county was damaged by flood waters. Naturally, flood clean up could not begin until the flood water had receded; that did not occur until a day or two after the flooding had taken place.

The Reserve was called in; it performed a significant amount of the flood repair work with its own equipment. The Federal Emergency Management Agency ("FEMA"), surveyed the damage and approved only one contractor–Sartin Trucking–to undertake flood relief work. All the work performed by Sartin Trucking was approved by FEMA; consequently, more than $1,000,00.00 was sent by FEMA to Mingo County ostensibly to pay the Sartin Trucking invoices.

B. 263 Towing and Marcum Trucking's Involvement.

263 Towing alleges an agreement with the Emergency Services Office; however, it asserts that the agreement "is believed to have been lost" (263 Towing's Response ¶ 1). Notwithstanding, 263 Towing submitted a number of invoices for work supposedly done on flood relief. These included invoices for work allegedly done between July 1, 2004 to July 15, 2004 in the amount of $148,500.00 (263 Towing's Response ¶ 2 & Exhibit B), between July 16, 2004 to July 31, 2004 in the amount of

$132,500.00 (263 Towing's Response ¶ 3 & Exhibit C), and between August 1, 2004 to August 9, 2004 in the amount of $32,680.00 (263 Towing's Response ¶ 2 & Exhibit D). Despite repeated requests for documents proving that 263 Towing had hired employees to do the flood relief work for which it billed the county, no evidence was ever produced that would substantiate the existence of said employees.

Marcum Trucking, by contrast, did supply the copy of an alleged agreement with the Emergency Services Office (Marcum Trucking's Response ¶ 1 & Exhibit A). Marcum Trucking also submitted a number of invoices for flood work allegedly done. These included invoices for work done between July 1, 2004 to July 15, 2004 in the amount of $93,125.00 (Marcum Trucking's Response ¶ 2 & Exhibit B), and between August 1, 2004 to August 6, 2004 in the amount of $40,150.00 (Marcum Trucking's Response ¶ 3 & Exhibit C). Like 263 Towing, Marcum Trucking could not provide evidence substantiating the existence of employees necessary to do the work for which it billed the County.

Both 263 Towing and Marcum Trucking allege that the County Commission had approved these invoices (263 Amended Petition ¶ 9; Marcum Trucking Amended Petition ¶ 9). Both 263 Towing and Marcum Trucking alleged that Sheriff Hannah "has refused to sign the checks from the County Commission to release the payments" (263 Amended Petition ¶ 10; Marcum Trucking Amended Petition ¶ 10).

The allegations were, in fact, essentially true. At the same time, Sheriff Hannah offered a number of reasons why he did refuse to sign the checks. He asserted that neither 263 Towing (Sheriff's 263 Towing Answer, Tenth Defense) nor Marcum Trucking (Sheriff's Marcum Trucking Answer, Tenth Defense), had "presented a legitimate, uncontested invoice" requiring "prompt

payment under West Virginia Code § 7-5-7." The Sheriff asserted that "[u]pon information and belief, the invoices presented ... are illegitimate" (Sheriff's 263 Towing Answer, Eleventh Defense; Sheriff's Marcum Trucking Answer, Eleventh Defense). Sheriff Hannah defended on the ground that "[u]pon information and belief," the two plaintiffs/petitioners had "fraudulently requested payment for services that were not in fact rendered" (Sheriff's 263 Towing Answer, Twelfth Defense; Sheriff's Marcum Trucking Answer, Twelfth Defense), and as to which neither plaintiff/petitioner had presented proof that the services were in fact rendered (Sheriff's 263 Towing Answer, Thirteenth Defense; Sheriff's Marcum Trucking Answer, Thirteenth Defense).

Indeed, the Sheriff asserted that both the United States Attorney's Office and the FBI "are currently investigating [the two plaintiffs/petitioners] for criminal violations in connection with the contested invoices" (Sheriff's 263 Towing Answer, Fourteenth Defense; Sheriff's Marcum Trucking Answer, Fourteenth Defense). In addition, Sheriff Hannah asserted that the State "Office of Inspector General and Abuse Investigations Divisions is currently investigating [plaintiffs/petitioners] for criminal violations in connection with the contested invoices" (Sheriff's 263 Towing Answer, Fifteenth Defense; Sheriff's Marcum Trucking Answer, Fifteenth Defense). On the basis of these alleged facts, and the legal conclusions purportedly flowing from those facts, Sheriff Hannah asserted conclusive defenses against the claims made against him (Sheriff's 263 Towing Answer, Sixteenth through Twentieth Defenses; Sheriff's Marcum Trucking Answer, Sixteenth through Twentieth Defenses).

In fact, testimony at the hearing established that 263 Towing had reduced its billing to the county by some $113,000.00, an act that well may have evidenced over billing (Transcript of Hearing held on October 2, 2006 in *Marcum Trucking v. Hannah*, Civil Action No. 05-C-304 and *263*

Towing, Inc. v. Hannah, Civil Action No. 05-C-305 ["Tr."] p. 40, l. 13-21, p. 48, l. 16-19). Thus, evidence in the trial court supported Sheriff Hannah's act of refusing to sign the checks–at least in the original amount.

As we have seen, however, the trial court rejected these defenses and ordered Sheriff Hannah to sign the checks–which he did. In addition, the court below assessed prejudgment interest and attorney's fees against the Sheriff as well. As Sheriff Hannah will demonstrate below, the disposition of this case in that court was erroneous on a number of grounds.

Since the filing of Appellant's Petition for Appeal, the owners of 263 Towing and Marcum Trucking were subpoenaed to testify in another proceeding. When questioned regarding the billing for the May 2004 flood relief work, all four owners asserted their Fifth Amendment Privilege not to testify. Accordingly, Sheriff Hannah respectfully asks the Court to vacate the orders below, and to remand the matter for proceedings in accord with that disposition.

III.

ASSIGNMENTS OF ERROR

1. The trial court erred in ordering the remedy of mandamus on the ground that Sheriff Hannah was under a legal duty to sign the checks in question (263 Towing Final Order, Judgment p. 15; 263 Towing Final Order Denying Motion ¶ 12; Marcum Trucking Amended Final Order, Judgment p. 14; Marcum Trucking Final Order Denying Motion ¶ 12).

2. The trial court erred in assessing attorney's fees against Sheriff Hannah (263 Towing Final Order, Judgment p. 15; 263 Towing Final Order Denying Motion ¶ 12; Marcum Trucking Amended Final Order, Judgment p. 15; Marcum Trucking Final Order Denying Motion ¶ 12).

3. The trial court erred in assessing prejudgment interest against Sheriff Hannah (263 Towing Final Order, Judgment p. 15; 263 Towing Final Order Denying Motion ¶ 12; Marcum Trucking Amended Final Order, Judgment p. 15; Marcum Trucking Final Order Denying Motion ¶ 12).

IV.

ARGUMENTS

A. THE PRESENT CASE INVOLVES IMPORTANT ISSUES FOR WHICH RELIEF SHOULD BE GRANTED.

This Court naturally has the full discretion whether to accept or reject Appellant's request for relief. As the Court will see upon examination of the arguments below, however, this case presents important issues involving the operation of county government and the interrelationship among its constituent parts. Above all, it presents issues as to how a public official like the Sheriff herein can best safeguard the legitimacy of public expenditures within the framework of his statutory duties and expenditures. When, as here, allegations of dishonesty and fraud arise in the context of what might be thought to be simple ministerial acts, it is important for governmental officials to understand the extent to which they are justified by law in refusing to undertake those acts. For these reasons, Appellant Lonnie Hannah respectfully urges the Court to grant the relief requested to clarify these important principles of West Virginia law.

B. STANDARD OF REVIEW.

The standard for the grant of a writ of mandamus in this State is well-settled:

> "A writ of mandamus will not issue unless three elements co-exist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Syl. pt. I, *State ex rel. Brown v. Corporation of Bolivar*, 217 W.Va. 72, 614 S.E.2d 719 (2005). *See also* syl. pt. 1, *State ex rel. Dickerson v. City of Logan*. ___ W.Va. ___, ___ S.E.2d ___, 2006 W.Va. Lexis 135 (W.Va., filed November 29, 2006)(same); syl. pt. 1, *Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986)(same).

A leading commentator states in pertinent part, as follows:

> A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right ... Due to the drastic character of the writ, the law has placed safeguards around it. Consideration should be had for ... the interests of the public ... as well as the promotion of substantial justice. In doubtful cases, the writ will be denied ... It will not lie where it would ... be harmful to the public interests.

12B Michie's Jurisprudence of Virginia and West Virginia *Mandamus* § 3 at 4 (2003 repl. vol.).

As the discussion below will demonstrate, the three required elements are not all satisfied in this case. In fact, it is to be doubted that any of them actually exist. The writ as issued is thus subject to the principle that "[a]lthough the co-existence of these [three] elements, standing alone, will not always suffice to justify the issuance of the writ, in the discretion of the court, the absence of *any* of these elements will make the issuance of the writ invalid." *Id.* at 4-5. Still less are the conditions outlined in Michie's Jurisprudence, *id.* at 4, satisfied under the facts at hand and the law applicable

thereto. A fortiori, the orders below are fatally flawed and in fact "invalid." *Id.* at 5. Sheriff Hannah's relief requested should be granted, therefore, and those circuit court orders in issue should be disapproved and vacated.

C. THE ISSUES IN THIS CASE ARE NOT MOOT SO AS TO NEGATE THIS APPEAL.

It is true that Sheriff Hannah has signed the checks in question (263 Towing Final Order Denying Motion ¶ 1; Marcum Trucking Final Order Denying Motion ¶ 1). By no means, however, does this fact render the present proceeding moot. First, the matters of attorney's fees and prejudgment interest remain in issue, for the Sheriff remains bound by the orders below to pay the sums ordered in that regard. Clearly, those portions of the disposition below depend for their legal viability upon the legal correctness of the writ of mandamus from which they flow. Thus, the issue of the writ of mandamus remains justiciable because the issues of attorney's fees and prejudgment interest likewise remain open.

Second, the mere appearance of mootness is often not sufficient to render an appeal futile. As this Court recently stated:

> "A case is not rendered moot even though ... the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review." Syllabus point 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

Syl. pt. 1, *State ex rel. Crist v. Cline*, ___ W.Va. ___, 632 S.E.2d 358 (2006). As Sheriff Hannah explained in Section IV(A) of this brief, the issue of the legal viability of the writ issued in the court below has great importance to the administration of local government in this State. Plainly, those considerations mandate a grant of this brief notwithstanding Sheriff Hannah's execution of the checks,

and even if, arguendo only, the remaining issues of attorney's fees and prejudgement interest were not themselves sufficient to rebut any mootness argument.

Moreover, a full consideration of the mootness issue favors a grant of the relief requested. As the Court went on to explain:

> "Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the [C]ourt will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided." Syllabus point 1, *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

Syl. Pt. 2, *State ex rel. Crist v. Cline*, *supra*. Here, the remaining issues of attorney's fees and prejudgment interest well satisfy the first factor; the great public interest in the issue, on the one hand, and the fact that the same issues may well reappear in the future, on the other hand, abundantly satisfy the second and third factors.

D. THE TRIAL COURT ERRED IN ORDERING THE REMEDY OF MANDAMUS ON THE GROUND THAT SHERIFF HANNAH WAS UNDER A LEGAL DUTY TO SIGN THE CHECKS IN QUESTION.

1. "[A] clear legal right in the petitioner to the relief sought."

There is grave doubt that either plaintiff/petitioner in this case was entitled to the relief sought, i.e., an issuance of the checks in question, so as to satisfy this initial requirement for mandamus. Certainly, an entitlement to the money is a bedrock requirement for the writ to issue.

The evidence in the trial court suggested that both parties–263 Towing and Marcum Trucking alike–had misbilled the county. Certainly, 263 Towing had concededly over billed the county in the amount of $113,000.00 (Tr. p. 40, l. 13-21, p. 48, l. 16-19). While it is true that 263 Towing had agreed to a reduction in the billing on a voluntary basis, it is to be doubted that such a proffer would have been forthcoming absent Sheriff Hannah's refusal to sign the checks. What is more, that reduction in the billing amount, when coupled with the Sheriff's overall objections, renders 263 Towing's entitlement to even the reduced amount highly problematic at best.

Nor does Marcum Trucking stand in any better stead with regard to *its* checks. First, in the Marcum Trucking billings, "[t]here were hundreds of hours of services without any employee records" (Tr. p. 17, l. 11-13). Second, the invoices themselves were irregular (Tr. p. 18, l. 14 to p. 20, l. 10). Third, some of the money sought and/or received by Marcum Trucking represented monies for which the plaintiff/petitioner had actually been indicted for obtaining money under false pretenses (Tr. p. 24, l. 1-8). Fourth, Marcum Trucking was upon information and belief represented by Greg Smith, the president of the Mingo County Commission, who in his official capacity voted to pay Marcum Trucking hundreds of thousands of dollars in invoiced amounts, of which $44,000.00 was actually covered by the Marcum Trucking indictment. These actions on the part of attorney and president Smith clearly violated plain West Virginia law, as follows:

> W. Va. Const. art. III, § 2 imposes a duty upon a public officer who is an attorney to refrain from representing persons who allegedly have claims against the public agency of which he is a member or against those agencies or employees thereof subject to the supervision of the public agency of which he is a member.

Syl. pt. 4, *Graf v. Frame*, *supra*. As a result, neither plaintiff/petitioner demonstrated its entitlement to payment; to the contrary, the evidence before the trial court was distinctly to the contrary. Hence,

the trial court's decision to issue the writ of mandamus (263 Final Order, Conclusions of Law ¶ 17; Marcum Trucking Amended Final Order, Conclusions of Law ¶ 18), is plainly in error and should be reversed and remanded.

2. *"[A] legal duty on the part of respondent to do the thing which the petitioner seeks to compel."*

a. contested invoices need not be paid.

Particularly in terms of the award of attorney's fees and prejudgment interest, the trial court relied on the Prompt Pay Act, W.Va. Code § 7-5-7 (263 Final Order, Conclusions of Law ¶ 5; Marcum Trucking Amended Final Order, Conclusions of Law ¶ 7). Yet the Prompt Pay Act provides in part that:

> Any properly registered and qualified vendor who supplies services or commodities to any county, or agency thereof, shall be entitled to prompt payment upon presentation to that county or agency of a *legitimate uncontested invoice*.

W.Va. Code § 7-5-7(a)(emphasis supplied). Here, the invoices were contested; moreover, their legitimacy has yet to be established. Certainly, this required legitimacy was by no means established in the court below.

This fact renders the issuance of the writ wrongful. As the court has stated in this connection:

> Also, "it is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof[.]" Syllabus Point 9, in part, *Vest v. Cobb,* 138 W.Va. 660, 76 S.E.2d 885 (1953).

In re McKinney, 218 W.Va. 557, 625 S.E.2d 319, 323 (2005). Thus, the employment of the words "legitimate uncontested invoice" must be given a full meaning and faithful application. Here, as a result, assuming that the invoices are contested, the statute must be read to entail that the Sheriff was

under no duty to pay them. In fact, if his statutory duties and oath of office have any meaning at all, *see* 263 Final Order, Conclusions of Law ¶ 7; Marcum Trucking Amended Final Order, Conclusions of Law ¶ 8, the statute must be read to entail that the Sheriff was under a positive duty *not* to pay them.

Indeed, the mere fact that this language appears in the Prompt Pay Act does not suggest that the Sheriff is free to pay contested invoices whose legitimacy is yet to be determined in an *un*prompt manner. Plainly, if the invoices are contested or their legitimacy is yet to be determined, then the Sheriff was entitled *not* to pay them under any legal test–period. For that reason, the issuance of the writ below is revealed to be reversible error.

b. the writ of mandamus ordered the payment of money whose availability was not factually determined.

The rule as to the expenditure of county money has long been that "[t]he County [Commission] may expend the current revenues and accrued funds, and make contracts looking to that end; as that, which the [commission] may have the means of paying either in the treasury or by the current fiscal levy." *Davis v.. Wayne County Court*, 38 W.Va. 104, 18 S.E. 373, 375 (1893). This entails in turn that "throughout its history the basic history of the statute has been that a local fiscal body shall make no contract and incur no obligation which would involve the expenditure of future levies." *Edwards v. Hylbert,* 146 W.Va. 1, 18, 118 S.E.2d 347, 356 (1960). *See also Shank Land Co. v. Joachim*, 96 W.Va. 708, 123 S.E. 444, 447 (1924).

That the court below was bound by that rule is without question. Indeed, Marcum Trucking's counsel acknowledged that "[t]he Sheriff has a statutory obligation to look at a check *and make sure*

there are funds available in the account" (Tr. p. 9, l. 5-7)(emphasis supplied). *See generally*, W.Va. Code § 7-5-1; Tr. p. 10, l. 5 ("so long as there's money in the County treasury").

The fact is that one reads the findings of fact in both sets of final orders in a futile search for any finding or even a hint that these requirements were satisfied. In fact, no such finding was made anywhere in the orders. Upon information and belief, the County Commission did overspend its budget to pay these invoices. This is why the payment process was strung out over multiple years; the County simply did not have the money in budget to pay these bills. This is a matter that the court below let go essentially unexamined by default. It follows that the issuance of the writ below is fatally flawed on this ground as well.

3. *"[T]he absence of another adequate remedy."*

As the Court is aware, the Sheriff and the County (and possibly the Emergency Services Office as well), were nominal co-defendants/respondents in this action. Whatever money damages are occasioned by the issuance of the writ are "to be paid out of the budget of the Mingo County Sheriff's Department" (263 Final Order, Judgment; Marcum Trucking Amended Final Order, Judgment). Clearly, the Sheriff's budget flows from the County Commission, which entails that the County and Sheriff are jointly liable for these damages in the form of prejudgment interest and attorney's fees. Yet, as long-standing case law mandates, this is not the proper remedy in such cases:

> When the County Court has provided a fund in the hands of the sheriff, *ex officio* the county treasurer, for the payment of claims against the county, and has caused to be issued and delivered to the creditor an order for his claim in form or effect as provided in section 37, c. 39, of the Code, and the sheriff, without fault on the part of the court, fails or refuses to pay the order, the creditor's remedy is against the sheriff. Section 39, c. 39, Code.

Syl. Pt. 1, *Ratliffe v. Wayne County Court*, 36 W.Va. 202, 14 S.E. 1004 (1892). As a consequence, the court in *Ratliffe* ruled that "[t]herefore the judgment of the Circuit Court of Cabell County rendered on the 18th of December, 1890, is reversed, the motion for the peremptory writ of *mandamus* overruled, and the *mandamus nisi* discharged." *Id.*, 14 S.E. at 1007.

In short, the proper remedy in cases like the one at hand is not mandamus; rather, it is an action against the Sheriff and his bond. For that reason, the remedy of mandamus actually ordered below constitutes error; hence, the orders entered by the trial court should be disapproved and vacated and the action remanded so that the plaintiffs/respondents may, if they be so advised, seek a direct remedy against Sheriff Hannah and his bond as the decision in *Ratliffe* suggests, assuming arguendo only that plaintiffs/respondents were entitled to relief in the first place. *Cf. White v. Mingo County Court*, 105 W. Va. 314, 142 S.E. 440 (1928) (same).[6]

E. THE TRIAL COURT ERRED IN ASSESSING ATTORNEY'S FEES AGAINST SHERIFF HANNAH.

In the first instance, it is easy to see that if, as Sheriff Hannah contends in this brief, the issuance of the writ of mandamus in the court below was wrong, the grant of an award of attorney fees would be a nullity as well. It does not require citation of authority to establish that a prevailing

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[6] In addition, as another decision dating from that era held:

> Where coupon bonds have been issued by a district in a county to assist in the construction of a railroad, and the coupons falling due in a certain year on said bonds have been levied for by the county court of said county, the holder of such coupons must look to the sheriff of the county for payment, and is not entitled by *mandamus* to compel a second levy upon the people and property of said district to pay the interest represented by such coupons.

Syl. pt., *Welty v. Borbour County Court*, 46 W. Va. 460, 33 S.E. 269 (1899).

party is not required to pay the attorney's fees of his defeated opponent. Thus, if the writ granted in the court below is reversed in this forum, the award of attorney's fees necessarily fails with it.

Even if, arguendo only, the Court were to find that the issuance of the writ by the court below was proper, it would still be the case that the award of attorney's fees was improper notwithstanding. The test for when such an award is proper in the context of official action was defined, as follows:

> Although one requirement for a writ of mandamus is "a clear right to the relief sought" (Syl. pt. 2, in part, *Myers v. Barte*, 167 W. Va. 194, 279 S.E.2d 406 (1981)), the showing of such "a clear right" does not automatically shift a petitioner's costs and attorneys' fees onto the public officer involved ... *Rather, "ordinarily, in mandamus proceedings, costs will not be awarded against a public officer who is honestly and in good faith endeavoring to perform his duty as he conceives it to be. [Citations* omitted.]" *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982). *Accord* Syl. pt. 5 *Graf v. Frame*, 177 W. Va. 282, 352 S.E.2d 31 (1986).

State ex rel. McGraw v. Zakaib, 192 W. Va. 195, 451 S.E.2d 761, 764 (1994)(emphasis supplied).

Certainly, it is the law that "[i]n mandamus proceedings where a public officer willfully fails to obey the law, attorney fees will be awarded." *Id.*, 451 S.E. 2d at 764, citing *Graf v. Frame*, *supra*, 352 S.E.2d at 39 (refusal to award costs and attorneys' fees where official "endeavored to comply in good faith on a case by case basis"); *Pritchard v. Crouser*, 175 W. Va. 310, 332 S.E.2d 611, 618 (1985). Where, on the other hand, "honest[y] and good faith" are present, *State ex rel. McGraw v. Zakaib*, *supra*, 451 S.E.2d at 764, quite a different rule is applied:

> *Nelson's* requirement of a public official's willful failure, is based on a long common law tradition of protecting a public servant who acts in good faith even though those acts are later found to be in error. In *State ex rel. Koontz v. Bd. of Park Comm'rs of City of Huntington*, 131 W. Va. 417, 429, 47 S.E.2d 689, 696 (1948), we said, "an award of costs in mandamus against a public officer. . .would have a tendency to deter such officer from undertaking the performance of his duty in instances in which his ultimate success may be doubtful." The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 425 (1982), noted that a rule that routinely penalized public officers would cause "distraction of officials from their

governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *See, Nelson*, 171 W. Va. at 451, 300 S.E.2d at 95 (Neely, J., concurring) (fee-shifting can be a mechanism to control abuse).

Id. Here, the evidence is clear that Sheriff Hannah was acting altogether "honestly and in good faith endeavoring to perform his duty as he conceives it to be," *id.*, when he declined to sign the contested checks. There can be no reasonable doubt that he had sincere and colorable doubts about the legitimacy and even the legality of the invoices underlying the checks he was being asked to sign. The fact is that his refusal to do so short of a court order, *see* Tr. p. 20, l. 11-13, was in the best traditions of his office. Even if, arguendo only, the Court were to find that his actions were wrong, therefore, there can be no doubt that an award of attorney's fees under all the facts and circumstances would be an abuse of discretion. *State ex rel. McGraw v. Zakaib*, *supra*; *Graf v. Frame*, *supra*; *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86, 91 (1982). For that reason, Sheriff Hannah respectfully submits that the attorney's fee award in the court below should be disapproved and vacated even if, arguendo only, the issuance of the writ itself is deemed to have been proper.

F. THE TRIAL COURT ERRED IN ASSESSING PREJUDGMENT INTEREST AGAINST SHERIFF HANNAH.

As noted above, the court below awarded prejudgment interest in the Marcum Trucking case only, pursuant to W.Va. Code § 56-6-31(a)(Marcum Trucking Amended Final Order, Conclusions of Law ¶ 25 & Judgment). As in the case of attorney's fees, if the Court finds that the writ of mandamus was wrongfully issued, the award of prejudgment interest falls of its own weight. Even if, arguendo only, the Court were to find the issuance of the writ to be proper, the award of prejudgment interest would be improper nonetheless.

Certainly, governmental bodies and, one assumes, governmental officials can be liable for prejudgment interest just like private litigants. *Corte Co., Inc. v. County Commission of McDowell County*, 171 W.Va. 405, 299 S.E.2d 16, 18-19 (1982). At the same time, there is a requirement of "fault" that must be satisfied before prejudgment interest can be assessed against the governmental body or official in issue. *Id.*, 299 S.E.2d at 19 (citing cases). Clearly, this requisite degree of "fault" is something above and beyond the simple "fault" that would permit one party to a lawsuit to prevail over his opponent; otherwise, the mere fact that one party prevailed would end the inquiry. To the contrary, the court in *Corte* looked to issues like the county commission's ostensible "reasonable effort in securing the final payment," the potential existence of "unreasonabl[e] delay[]," plus general principles of "[e]quity and fairness." *Id.* at 20.

In *Corte*, the court remanded the matter for factual findings on these issues. *Id.* Here, even though the court below did not even consider such matters but simply seemed to assume that prejudgment interest was available as a matter of course, *see* Marcum Trucking Amended Final Order, Conclusions of Law ¶ 25 & Judgment, it is clear from the record in this case that the "fault" necessary to support an award of prejudgment interest is absent.[7] Given, as discussed above, the grave doubts as to the legitimacy of the invoices coupled with the request by the federal government to hold back payment pending a criminal investigation (Marcum Trucking Amended Final Order, Conclusions of Law ¶ 13), the delay in payment, even if it was ultimately enforceable against the Sheriff, was "reasonable" so as to mandate that the payment of prejudgment interest is inconsistent

[7] In actuality, the trial court appears to have acknowledged these principles because it both recognized and applied the notion of fairness in denying any award of prejudgment interest in the 263 Towing case. *See* 263 Towing Final Order, Conclusions of Law ¶ 25 & Judgment. The court's error lay in not applying these principles to Marcum Trucking and denying an award of prejudgment interest to that plaintiff/petitioner, as well.

with "[e]quity and fairness." *Corte Co., Inc. v. County Commission of McDowell County, supra,* 299 S.E.2d at 20.

That test was not met in *Corte*; it is similarly not met in this case. *Cf.* Syl. pt. 1, *Lewis v. Chafin,* 215 W.Va. 11, 592 S.E.2d 790 (2003). It follows that the award of prejudgment interest by the court below cannot stand even if, arguendo only, it is assumed that the underlying judgment itself is valid. For this reason as well, the orders entered below should be disapproved and reversed.

V.

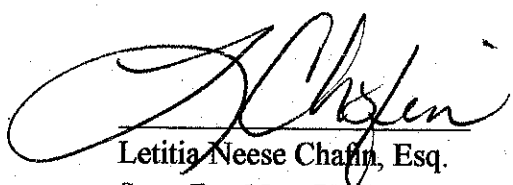
CONCLUSION

For the reasons set out above, Appellant, Lonnie Hannah respectfully asks the Court to disapprove and vacate the orders entered below regarding (a) the issuance of the writ of mandamus; (b) the award of attorney's fees; and (c) the award of prejudgment interest. Finally, Sheriff Hannah asks the Court to remand the matter to a trial court with instructions in turn to remand and/or assign the entire matter to the Office of Inspector General, Fraud and Abuse Investigations Division so that the truth of the bona fides of the invoices in question can authoritatively be determined.

Respectfully submitted,

LONNIE HANNAH

By Counsel



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May 22, 2007

CERTIFICATE OF SERVICE

I, Letitia Neese Chafin, Esq., counsel for the Apellant Lonnie Hannah, Sheriff of Mingo County, do hereby certify that I served the foregoing APPELLANT'S BRIEF, by causing a true and correct copy of the same to be deposited in the U.S. Mail, First Class postage prepaid, addressed as follows, on this 23rd day of May, 2007:

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